



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

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- I. **SUBJECT:** **CROSS- EXAMINATION OF POLICE WITNESSES**
- II. **QUESTION:** May police witnesses be cross-examined in a criminal trial about prior misconduct including allegations made against the officer in unrelated civil cases or disciplinary proceedings?
- III. **ANSWER:** Yes, in certain circumstances, cross-examination of an officer about allegations of prior misconduct made to IAB or CCRB, and those made in unrelated civil cases, may be permitted, even when those allegations have not yet been proven.

IV. **DISCUSSION:**

A. Introduction

At every trial, the defendant has a constitutional right to confront and cross-examine witnesses called to testify against him or her. A key purpose of cross-examination is to create doubt in the minds of jurors about whether a witness is reliable or believable. To ensure a defendant's right to a fair trial, the law requires that before trial, the prosecutor must disclose to the defense attorney all relevant impeachment material for a prosecution witness. Impeachment material for a witness includes, among other things, a witness's criminal convictions (if any) and any prior misconduct committed by the witness and known to the prosecution that bears on the witness's credibility.

The purpose of this Bulletin is: (1) to alert Members of the Service that, when appearing as a witness for the prosecution, they may, in certain circumstances, be cross-examined by defense counsel about prior allegations of misconduct; and (2) to advise officers that, before they take the witness stand, a prosecutor may ask the officer about any instances of misconduct in the officer's background in order to prepare the officer for cross-examination.

B. Allegations of Misconduct in Other Proceedings as Impeachment Material

The same rules that apply to the prosecutor's duty to disclose impeachment material for civilian witnesses also apply to police witnesses. As a result, the prosecution must disclose to the

defense any **proven or substantiated allegations** of a police witness's misconduct in any other matter when the prosecution has knowledge of that information and when the misconduct is somehow relevant to the present case that is going to trial.¹ In addition, court decisions make clear that impeachment material may also include mere allegations against a police officer in a civil lawsuit, even when the allegations have not been proven at trial or in a court proceeding.²

For example, a defendant confessed to the murder of a 13-year-old girl, but then later alleged that a police detective coerced him into confessing. The court held that allegations made in a civil lawsuit that the same detective coerced a confession in an unrelated arson investigation involving a different defendant could be used to impeach the detective during the murder trial. The underlying facts of the allegation were relevant to the detective's testimony because they supported the murder defendant's false confession theory.³ The court stated that facts underlying allegations "can [still] be proper fodder for cross-examination" even though the allegations had not yet been proven in the civil trial.⁴ Although appellate courts have not yet ruled that this principle applies to unproven IAB or CCRB allegations, some trial judges have liberally extended these rulings to require prosecutors to disclose CCRB and/or IAB allegations as well.

This is not to say that there are no limits on what a defense attorney may ask a police witness in this regard. First, the allegations that form the basis for the questioning must be relevant to the credibility of the officer. Second, the police officer can only be asked about the facts underlying the allegations and not whether he or she has been accused of misconduct by another person. To illustrate, the proper cross-examination question in the above-described homicide case would be: "*Isn't it true, officer, that when you were questioning a suspect in an arson investigation you threatened him to get him to speak to you?*" **and not** "*Isn't it true that you were sued by another defendant for forcing him to confess?*" Defense counsel should also be prohibited from asking the officer whether he or she has been sued or whether a civil case settled, unless there is an admission of wrongdoing on the part of the officer as part of the settlement. Typically, settlement agreements contain language that states that nothing in the agreement should be deemed an admission of liability. Finally, defense counsel may not ask if the underlying criminal charges relating to the plaintiff's civil action were dismissed in an effort to show that the officer acted improperly.

C. Adverse Credibility Findings as Impeachment Material

A police witness may also be cross-examined about instances in which another judge in an unrelated hearing or trial found the officer's testimony to be incredible. Prosecutors refer to this type of impeachment material as an "adverse credibility finding." Although New York appellate courts have not yet decided whether cross-examination of a police officer about an adverse credibility finding is appropriate, some trial judges in state court rely on these federal decisions to permit such cross-examination.

D. Disclosure Letters

¹ *People v. Garrett*, 23 N.Y.3d 878, 888-90 (2014).

² *People v. Smith*, 27 N.Y.3d 652, 661 (2016).

³ *Garrett*, 23 N.Y.3d at 886.

⁴ *Smith*, 27 N.Y.3d at 661.

It is the practice of some District Attorney's Offices and United States Attorney's Offices to prepare a letter for defense counsel and the court which summarizes impeachment material pertaining to a particular officer that, in the prosecution's judgment, must be disclosed. In such instances, an Assistant District Attorney ("ADA") or Assistant United States Attorney ("AUSA") will provide a copy of the letter to defense counsel prior to trial. As part of trial preparation, the ADA or AUSA should also advise the officer who will be testifying at trial that such a letter exists, review the letter with him or her and discuss anticipated cross-examination.

E. Best Practice is to Discuss Background Information with the Prosecutor to Prepare for Cross- Examination by Defense Counsel

In anticipation of the cross-examination of a police officer, a prosecutor should prepare an officer to testify prior to trial by, among other things, asking him or her a series of questions designed to ascertain if there is any impeachment material in the officer's background.

The questions a prosecutor is likely to ask during preparation include:

- Whether an officer is aware that his or her testimony at a hearing or trial has ever been found by a judge to be incredible;⁵
- Whether an officer has a pending criminal case or a past criminal conviction against him or her;
- Whether an officer is aware of any pending or past civil lawsuit filed against him or her, what the suit was about and what was the outcome;
- Whether an officer or the Department has posted anything about the case on any social media accounts or whether there is any derogatory information about the officer anywhere on the Internet, of which he or she is aware; and
- Whether an officer is aware of any pending or past CCRB and/or IAB investigations.

Police personnel files are confidential under New York Civil Rights Law § 50-a. The law prohibits defense attorneys from directly accessing an officer's disciplinary records, although there is an exception for prosecutors to access limited portions of the officer's disciplinary history during the course of the prosecutor's official duties. Thus, the law does not prohibit prosecutors from seeking information responsive to these questions.

It is beneficial to both the officer and the prosecution for the officer to answer these questions honestly and completely. By learning about such information ahead of time, the prosecutor may be able to prevent its use by arguing before the trial judge that the information is not relevant, will likely confuse or mislead the jury or will create a substantial risk of undue prejudice to the prosecution. This is often referred to as a "*motion in limine*." While impeachment evidence must be disclosed to the defense, it is always in the complete discretion of the trial court whether to bar its use during cross-examination. Moreover, even if the court is inclined to permit cross-examination about an officer's past misconduct, a fully informed prosecutor may be better able to successfully argue for restrictions on the cross-examination of the officer so that improper or inaccurate questions are not asked.

⁵ Incredible - a legal term meaning not reliable, in error, illogical or not believable.

In addition, an officer's failure to inform the prosecutor about such information may negatively impact the trial. A defense attorney may otherwise learn of the information by investigating and researching the officer's background. For example, some court records are available on the Internet, providing defense attorneys easy access to information and records pertaining to lawsuits filed against police officers. Any media coverage about such litigation is also easily accessible. Further, the Legal Aid Society claims to have assembled its own database on police officers in which information about officers' civil lawsuits, allegations of misconduct, and adverse credibility findings are stored and accessed by Legal Aid's attorneys prior to a hearing or trial. Whether their database is as comprehensive as claimed is unclear. Other attorneys and defense organizations are likely to adopt this practice as well. Finally, once a court permits cross-examination of a particular officer about past misconduct, the officer should assume that the information may resurface in a subsequent unrelated trial. Defense attorneys often share information and transcripts of proceedings among themselves.

In sum, because defense attorneys have alternative methods to obtain an officer's background information, it is the best practice to provide accurate and complete responses to the prosecutor's questions during trial preparation in order to become a well-prepared witness and to avoid surprise that may negatively impact the case. If an officer is uncertain about the outcome of a civil lawsuit against him or her, he may contact the Legal Bureau's Police Action Litigation Section (PALS) for assistance. If an officer has a pending disciplinary matter or a pending criminal or civil lawsuit the officer may wish to confer with his or her attorney or the Law Department attorney handling the civil litigation and/or put the prosecutor in touch with that attorney prior to speaking to the prosecutor about the facts underlying the case or prior to answering questions about it during cross-examination.

F. Conclusion

A police officer who testifies at a criminal trial may be cross-examined about derogatory information in his or her background for impeachment purposes. In anticipation of such cross-examination, prosecutors will prepare an officer by inquiring about past and present misconduct allegations, civil lawsuits, criminal convictions, information on social media accounts and Internet sites, and if any past testimony by the officer was found to be incredible by a judge. To be well prepared and to ensure a just outcome in the case, officers should provide relevant background information to the prosecutor prior to testifying.

Members of the Service are encouraged to call the Legal Bureau at (646) 610-5400 with questions about the principles discussed in this bulletin.

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